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SUBJECT: Constitutional Debate 3: ODM Defending Current Draft Constitution

REF: NAIROBI 2514

CLASSIFIED BY: Michael E. Ranneberger, Ambassador; REASON: 1.4(B), (D)

¶1. Summary: This cable is part three of a five part series on the contentious issues and political landscape surrounding the debate on Kenya's Harmonized Draft Constitution. Cable one provided a snapshot of the outstanding contentious issues in the draft constitution: executive authority, devolution, judicial reform, and the Kadhi's courts. Cable two analyzed the influential voices, political position, and strategy of President Kibaki's Party for National Unity (PNU) in respect to the draft; while this cable provides an analysis of Prime Minister Raila Odinga's Orange Democratic Movement (ODM). Cable four reports on the efforts of moderates, both within and outside of the two major parties to broker a compromise between hardline ODM and PNU positions. Cable five assesses the dynamics of public opinion and special interest groups in the context of the upcoming national referendum on the draft constitution.

¶2. (C) Summary continued: Prime Minister Raila Odinga, and the members of the Orange Democratic Movement (ODM) allied to him, view the Harmonized Draft Constitution as a victory. The draft's current provisions for a strong executive prime minister and the devolution of political power and resources largely reflect the ODM position on these two contentious issues. Accordingly, ODM negotiators are not yielding ground to the President's Party for National Unity (PNU) team in the two committees formed to reach a consensus position. Odinga has expressed confidence that ODM's narrow majority in Parliament will be sufficient to amend the two-thirds majority needed to amend the draft. In the referendum, ODM would seek to reform its old alliance of Luo, Kalenjin, Coast and Muslim communities to carry the day. In this, Odinga may be underestimating the strength of an emerging PNU collaboration with dissident ODM leaders which could frustrate his goals both in Parliament and the referendum. End summary.

¶3. (C) Raila Odinga has campaigned for the creation of an executive prime minister post since supporting President Kibaki's candidacy in 2001 in return for a promised appointment as PM. When Kibaki reneged on the deal and failed to support the "Bomas Draft" constitution that proposed the creation of an executive prime minister, Odinga built a national coalition (the ODM) of medium-to-small ethnic groups to support his presidential candidacy in 2007. Historically, these ethnic groups have supported the principle of "majimbo" (roughly translated as "federalism") to devolve power away from Kenya's strong central government which is perceived as favoring the Kikuyu ethnic group under Presidents Kenyatta and Kibaki. This history and the disputed 2007 election results solidified ODM's support for the creation of a strong prime minister and the devolution of political power and resources to local authorities.

¶4. (C) The Harmonized Draft Constitution reflects ODM's position on these two key issues: it stipulates an executive Prime Minister as head of government and significant devolution of political power and resources to newly-created regional and county governments (Ref A). During the drafting exercise a number of senior PNU leaders

complained that the Committee of Experts, tasked with writing the draft, was dominated by ODM supporters, and at one point key PNU negotiators withdrew from the committee in protest. Accordingly, ODM negotiators on the two committees charged with reconciling the two parties' positions on the draft have refused to yield significant authority back to the President as proposed by the PNU. The ODM team notes that Kenya's history of centralized government has not delivered economic benefits to citizens, emphasizing the example of countries with successful coalition governments (Germany) and divided executive structures (France),

¶ 15. (C) Though we have repeatedly encouraged Odinga and other ODM leaders to engage in good faith negotiations with the PNU, Odinga has made it clear that he believes his party's narrow majority in Parliament, coupled with the public support he won in 2007, will be sufficient to carry the draft constitution without major amendments. In support of this view, the ODM maintains that Odinga in fact won the 2007 elections and thus has popular support. In addition, Odinga has reached out to his traditional opponents in Central province (PNU's power base); regardless of the success of these efforts, Odinga clearly believes that Kenyans' strong desire for a new constitution will overcome any objections raised by the PNU in the public referendum. Odinga believes he could ride the political wave to a strong ODM victory in the 2012 elections if bolstered by a win in the referendum.

¶ 16. (C) Odinga's approach discounts two major obstacles. Since the election, the integrity of ODM's coalition has weakened significantly, as a dissident faction (led by Agriculture Minister William Ruto and Minister for Tourism Najib Balala) is potentially willing to collaborate with PNU leaders. The PNU and dissident ODM

NAIROBI 00002533 002 OF 002

leaders could possibly control as much as two-thirds of the vote in the Parliamentary Select Committee (PSC). The PSC has the power to amend the draft prior to its introduction to Parliament; Odinga and the core ODM team could find that they are facing a very different draft in short order. Should the draft pass unaltered through Parliament, PNU could mobilize a number of powerful interest groups, notably the church, to defeat the constitution in the referendum (for further details of the PNU strategy, see cable three in this series).

¶ 17. (C) As Odinga's team has realized the gravity of the PSC threat, there are indications of a renewed commitment to negotiations. However, members of the committees report that the ODM has yet to unite around any significant concessions. At this point, the most likely compromise position is one in which the president is permitted to appoint a number of key ministers (Defense, Foreign Affairs, Internal Security) while the prime minister retains overall supervisory authority. If such a compromise is struck, critics citing problems with two centers of power will need to be placated.

¶ 18. (C) Comment: The negotiations around the draft constitution remain very fluid and post continues to push both sides to make meaningful compromises on the executive and devolution. Should ODM maintain a hardline position and refuse amendments to the draft which dilute the Prime Minister's authority, we anticipate that the PNU's strength in the PSC could produce a draft that is unacceptable to the ODM. Regardless of which party prevails in Parliament, absent a compromise position Kenya will be headed toward a divisive, potentially violent referendum. End comment.
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